[K-165]

No. 80-5889

Supreme Court, U. S.
FILED
JAN 7 1981
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

v.

BERNARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK SUBMITTED PURSUANT TO RULE 36(4) OF THE RULES OF THIS COURT IN OPPOSITION TO GRANTING CERTIORARI

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Question Presented

Does the standard of proof by a fair preponderance of the evidence under section 622 of the New York State Family Court Act, which requires that in a proceeding for the commitment of the guardianship and custody of a child on the ground of permanent neglect it be established that the child is under 18 years of age; in the care of an authorized agency; that the authorized agency has made diligent efforts to encourage and strengthen the parental relationship; and that the parent or guardian, notwithstanding the agency's efforts, has failed for a period of more than one year following the date such child came into the care of the authorized agency, substantially and continuously or repeatedly failed to maintain contact with or plan for the future of the child, although physically and financially able to do so, violate the due process clause of the United States Constitution?

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Statement

Petitioners assert in their petition for a writ of certiorari that section 622 of the Family Court Act of the State of New York is unconstitutional and denies them due process under the United States Constitution, Fourteenth Amendment. The Attorney General of the State of New York, pursuant to New York State Executive Law, §71, submitted a brief to the Supreme Court,

Appellate Division, Third Department, in support of the constitutionality of section 622 of the New York State Family Court Act. The Attorney General submits this *amicus curiae* brief in opposition to the petitioners' application for certiorari upon the grounds that section 622 of the New York State Family Court Act is constitutional and that the petition presents questions which are not substantial constitutional questions.

Opinions Below

The opinions below are attached to the petition for a writ of certiorari.

The Supreme Court, Appellate Division, Third Department, held that the New York State Family Court Act recognizes and seeks to balance rights possessed by the child with those of the natural parents and, accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional.

The Court of Appeals of the State of New York granted a motion to dismiss the appeal taken by petitioners to that Court upon the ground that no substantial constitutional question was directly involved.

Facts

The petitioners' child Tina, who is now nine years of age, has been in a foster home for the past seven years; the petitioners' child John, who is now seven years of age, has been in a foster home for the past six years; the petitioners' child Jed, who is now six years of age, has been in a foster home for the past six years. The statement of the case contained in the petition adequately sets forth the facts in this proceeding.

State Statutes Involved

The relevant State Statutes involved are attached hereto as Appendix A.

Reasons For Denying the Writ

In the case of *Doe v Delaware* (Docket No. 79-5932), presently pending before this Court, the standard of proof is based on Delaware decisional law. In the instant case the standard of proof has been promulgated by the Legislature of the State of New York. New York State Family Court Act §622 was enacted in 1959 based on legislative findings wherein the Legislature found that it is desirable for a child to grow up with a normal family life in a permanent home and that it is generally desirable for a child to remain with or be returned to the natural parent. That when it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child. It was further found that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents and that such unnecessary stays deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. The intent of the New York State Legislature is stated as follows (New York State Social Services Law §384-b):

"1. • • •

(b) • • •

"It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption."

The statute attempts to balance a child's right against the parent's right. When the relevant statutes were amended in 1959 (New York Session Laws 1959, chs 448, 449, 450) and defined the term "permanently neglected child", it was

recognized that two rights were involved — the child's and the parent's.

> "Senate Bill, Introductory Number 3437, and Assembly Bill, Introductory Number 1751, amend the Children's Court Act and the Domestic Relations Court Act, respectively, to define the term 'permanently neglected child' and to provide procedures by which a child may be judicially determined to be permanently neglected. These procedures recognize a parent's rights with respect to his child, but at the same time recognize a *child's right* to have every opportunity for normal family affection and care." (Emphasis supplied.) (Governor's Memorandum of Approval, 1959 McKinney's Session Laws, p 1750.)

> "Permanent termination statutes focus by necessity on the care the parent gives to the child. Unless the parent is found unfit, his rights in the child cannot be terminated. At the same time the statutes will not be given their proper application until the *rights* and interests *of the child* also receive due recognition. Alongside the rights of parents in children should be recognized the *rights of children* in parents — parents who will take them into a warm and supportive permanent home." Gordon, Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute, 46 St. John's Law Review, 215, 263 (1971). (Emphasis supplied.)

The Family Courts of the State of New York in applying the statute have done so with recognition that while the rights of parents must be jealously guarded, the purpose of the statute was to provide a solution to the problem where a parent has failed to act as a parent but has nevertheless refused consent to adoption. In *Matter of Klug*, 32 AD2d 915, the Supreme Court, Appellate Division, First Department, in its decision, stated in part as follows (916):

> "* * * With knowledge that the purpose of the statute was to enlarge a definition of neglect so as to provide a solution for the many thousands of children placed in

> institutions and forgotten by their parents, * * *. * * * While the rights of parents must be jealously guarded, it should not be forgotten that the purpose of the present statute was to provide a solution to the problem where a parent has failed to act as a parent but has nevertheless refused her consent to adoption. The emphasis of the statute was not on the rights of natural parents, but on the plight of thousands of forsaken children whose parents had abandoned their responsibilities of care and support. A parent who has failed in her obligation to maintain, care for, protect and plan for the future well-being of her child, has forfeited her parental rights. The welfare of the child is still the primary and paramount concern of the court. * * *"

In *Matter of Jones*, 59 Misc 2d 69, the Family Court of New York County, in its decision, stated in part as follows (74):

> "* * * When the biological parents fail to accept the parental role, the State in these proceedings must attempt to insure for the child what should be his birthright: a responsible and affectionate parental relationship — 'a happy home and the love and affection to which all children are entitled.' (See *Matter of Knapp*, 3 Misc 2d 840, 843 [Surrogate's Ct, Kings County, 1956].)"

The statute (Family Court Act, §622) seeks a balance between a child's right and a parent's right. It is submitted that the rights are equal. The scales of justice should not be tipped one way or the other. In cases such as this which involve conflicting rights of parents and of children, neither should be forced to share a greater degree of proof than the other. The adoption by the Legislature of the "preponderance of the evidence" rule assures that the scales are not tipped in favor of either party.

Other states have upheld the preponderance rule in proceedings to terminate parents' rights. In *Matter of N.J.W.*, 273 NW2d 134 (So Dak, 1978), the Court stated in part at pages 139-140 as follows:

"Appellants next contend that the standard of proof in dependency and neglect cases, a preponderance of the evidence, is unconstitutional and that the court erred in applying that standard. Appellants argue that where fundamental rights are concerned, a higher standard of proof is required, i.e., beyond a reasonable doubt. We strongly disagree. Dependency and neglect cases involve the often-conflicting rights of parents and of children. It becomes necessary, in determining the proper standard of proof, to weigh the interests of both parent and child. We fully agree with the reasoning of the Arizona Court of Appeals in *Hernandez v. State ex rel. Arizona Dept. of Econ. Sec.*, 23 Ariz. App. 32, 530 P.2d 389 (1975), where the Court stated:

'In a termination proceeding an error in factual determination can result in the termination of the parental relationship when such termination is not justified. On the other hand it can result in the failure to terminate when the relationship should be ended. The standard of proof is going to affect the relative frequency of those two erroneous outcomes. [A higher standard of proof] would result in a greater risk than (sic) parental rights would be erroneously severed, but a smaller risk than (sic) a child, as a result of a factual error, would be forced to return to a hostile, if not dangerous, family situation or spend his childhood in a series of temporary foster homes. Comparing the social disutility of these two erroneous outcomes, we do not believe that one can make a *fundamental* value determination that the erroneous severance of parental rights, vis-a-vis the erroneous failure to sever, constitutionally requires a higher burden of proof. (530 P.2d at 393)

This is not a situation, as in a criminal case, where the conflict is between an individual and the state. In such a case, the rights of the individual are paramount to those of the state and an extremely high standard of proof, i.e. beyond a reasonable doubt, is indeed proper and required. However, in the case before us, the conflict is essentially between the rights of the parents and those of the children. In this situation, the application of a balancing

test is eminently logical and necessarily fair. Therefore, the preponderance of the evidence standard is proper and constitutional.' "

That the State as *parens patriae* may act to guard the interest of children has long been established. This Court in *Ginsberg v State of New York*, 390 US 629, held at pages 639 and 640 as follows:

> "The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in §484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find the minors' exposure to such material might be harmful. * * *
>
> "The State also has an independent interest in the well-being of its youth. The New York Court of Appeals squarely bottomed its decision on that interest in Bookcase, Inc. v. Broderick, supra, 18 N.Y.2d, at 75, 271 N.Y.S.2d, at 951, 218 N.E.2d, at 671. Judge Fuld, now Chief Judge Fuld, also emphasized its significance in the earlier case of People v. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333, which had struck down the first version of §484-h on grounds of vagueness. In his concurring opinion, 15 N.Y.2d, at 312, 258 N.Y.S.2d, at 392, 206 N.E.2d, at 334, he said:
>
> > 'While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.'
>
> In Prince v. Commonwealth of Massachusetts, supra, 321 U.S., at 165, 64 S.Ct., at 441, this Court, too, recognized

> that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free citizens.' "

The cases cited by the petitioners in support of their constitutional argument are not relevant to the issue herein. *In Re Winship*, 397 US 358 (1970) involved the loss of liberty. This Court held that loss of liberty by a juvenile delinquent fell in the same category as loss of liberty by an adult and hence the "beyond a reasonable doubt" rule applied. The petitioners herein face no loss of their liberty.

In *Addington v Texas*, 441 US 418, 99 S Ct 1804 (1979), another loss of liberty case (involving commitment to a State mental hospital), this Court held as follows (431):

> "Having concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable doubt standard is not required, we turn to a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the State."

The *Woodby v INS*, 395 US 276 (1965), and *Chaunt v United States*, 364 US 350 (1960), cases referred to by this Court in the *Addington* decision, wherein it had previously applied the "clear, unequivocal and convincing" standard of proof to protect interests in civil cases, are inapposite for two reasons: All are cases involving the State and individuals, with loss of liberty at stake; and all involve proceedings solely within the jurisdiction of Federal courts (naturalization and deportation). The Federal courts for this latter reason are free to adopt their own rules on burden of proof. However, when State laws and matters of State concern are involved, other principles apply.

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine* v. *California*, 347 U.S. 128, 134 (1954) (plurality opinion), and that we

> should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)." *Patterson v. New York*, 432 U.S. 197, 201, 202 (1977).*

The petitioners' contention that the burden of proof in a parent-child custody proceeding should be "clear and convincing evidence" is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

In a most recent case, this Court has upheld the power of Congress to utilize the "preponderance" rule in loss of citizenship cases. In *Vance v Terrazas*, 444 US 252 (1980), the Court held (pp 264, 266) as follows:

(264) "With respect to the principal issues before it, the Court of Appeals held that Congress was without constitutional authority to prescribe the standard of proof in expatriation proceedings and that the proof in such cases must be by clear and convincing evidence rather than by the preponderance standard prescribed in §1481(c). We are in fundamental disagreement with these conclusions.

* * *

(266) "We are unable to conclude that the specific evidentiary standard provided by Congress in §1481(c) is invalid

*In *Patterson*, this Court upheld New York's rule of placing on the defendant the burden of proving by the preponderance of the evidence the affirmative defense of extreme emotional disturbance when charged with the crime of second degree murder.

> under either the Citizenship Clause or the Due Process Clause of the Fifth Amendment. It is true that in criminal and involuntary commitment contexts we have held that the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Addington* v. *Texas*, ___ U.S. ___ (1979). This Court has also stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation. *Nishikawa* v. *United States*, *supra*. But expatriation proceedings are civil in nature and do not threaten a loss of liberty. Moreover, as we have noted, *Nishikawa* did not purport to be a constitutional ruling, and the same is true of similar rulings in related areas. *Woodby* v. *Immigration Service*, 385 U.S. 276, 285 (1966) (deportation); *Schneiderman* v. *United States*, 320 U.S. 118, 125 (1943) (denaturalization). None of these cases involved a congressional judgment, such as that present here, that the preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship. Contrary to the Secretary's position, we have held that expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship. This in itself is a heavy burden, and we cannot hold that Congress has exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of evidence."

It is respectfully submitted that parent-child custody is more a matter of State concern that Federal and the New York State Legislature "has not exceeded its powers by requiring proof • • • by a preponderance of evidence" as Congress has done with citizenship cases.

It is presumed that the Legislature of the State of New York acted with full knowledge of the facts and for the purpose of protecting both the interest of the parent and the child. In *Atchison, T. & S.F.R. Co. v Matthews*, 174 US 96, this Court stated in part as follows (104):

"* * * It is * * * a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. * * *"

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: Albany, New York
December 24, 1980

Respectfully submitted,

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APPENDIX

APPENDIX A

Social Services Law:

"§384-b. Guardianship and custody of destitute or dependent children; commitment by court order

1. Statement of legislative findings and intent.

(a) The legislature hereby finds that:

(i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home; and

(iv) when it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

(b) The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. The legislature further finds that provision of a timely procedure for the termination, in appropriate cases, of the rights of the natural parents could reduce such unnecessary stays.

It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption.

* * *

7. (a) For the purposes of this section, 'permanently neglected child' shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court.

(b) For the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact.

(c) As used in paragraph (a) of this subdivision, 'to plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances

available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

(d) For the purposes of this subdivision:

(i) A parent shall not be deemed unable to maintain contact with or plan for the future of the child by reason of such parent's use of drugs or alcohol, except while the parent is actually hospitalized or institutionalized therefor;

(ii) A parent shall be deemed unable to maintain contact with or plan for the future of the child while he is actually incarcerated; and

(iii) The time during which a parent is actually hospitalized, institutionalized, or incarcerated shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child.

(e) Notwithstanding the provisions of paragraph (a) of this subdivision, evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when the parent has failed for a period of six months to keep the agency apprised of his or her location.

(f) As used in this subdivision, 'diligent efforts' shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

(2) making suitable arrangements for the parents to visit the child;

(3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and

(4) informing the parents at appropriate intervals of the child's progress, development and health."

Family Court Act:

"§611. Permanently neglected child; purpose of part

"The purpose of this part is to provide the procedures for proceedings initiated in family court, pursuant to section three hundred eighty-four-b of the social services law, for the commitment of the guardianship and custody of a child upon the ground that the child is a permanently neglected child. As used in this part 'permanently neglected child' shall mean permanently neglected child as defined in subdivision seven of section three hundred eighty-four-b of the social services law, and unless the context requires otherwise, the provisions of such section three hundred eighty-four-b shall be deemed applicable requirements in addition to the procedures contained in this part. All references in this part to petitions and proceedings initiated 'under this part' shall be deemed references to petitions and proceedings initiated under section three hundred eighty-four-b of the social services law upon the ground that the child is a permanently neglected child."

"§614. Originating proceeding for the commitment of the guardianship and custody of a permanently neglected child

1. A proceeding for the commitment of the guardianship and custody of a child on the ground of permanent neglect is originated by a petition, alleging:

(a) the child is a person under eighteen years of age;

(b) the child is in the care of an authorized agency;

(c) the authorized agency has made diligent efforts to encourage and strengthen the parental relationship and specifying the efforts made or that such efforts would be

detrimental to the best interests of the child and specifying the reasons therefor;

(d) the parent or custodian, notwithstanding the agency's efforts, has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so; and

(e) the best interests of the child require that the guardianship and custody of the child be committed to an authorized agency or to a foster parent authorized to originate this proceeding under section three hundred ninety-two of the social services law or section one thousand fifty-five of this act.

2. Where the petitioner is not the authorized agency, allegations relating to the efforts of the authorized agency may be made upon information and belief."

"§622. Definition of 'fact-finding hearing'

"When used in this part, 'fact-finding hearing' means in the case of a petition for the commitment of the guardianship and custody of a child, a hearing to determine whether the allegations required by paragraphs (a), (b), (c), and (d) of subdivision one of section six hundred fourteen are supported, by a fair preponderance of the evidence."

"§624. Evidence

"Only competent, material and relevant evidence may be admitted in a fact-finding hearing; only material and relevant evidence may be admitted in a dispositional hearing. Evidence of parental contact or of failure to maintain contact with a child subsequent to the date of the filing of a petition under this part shall be inadmissible in the fact-finding hearing. Such evidence may be admitted in the dispositional hearing but shall not, of itself, be sufficient as a matter of law to preclude or require an order committing the guardianship and custody of the child."